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No. 80-1666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,
Appellants,

v.

PAMELA VALENTE, LARRY BARBER, LARRY HAFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,
Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE

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QUESTIONS PRESENTED

Whether the Minnesota Charitable Solicitations Act violates the principles of neutrality, as guaranteed by the religion clauses of the First Amendment to the United States Constitution and whether Plaintiffs have standing where there has not been a finding that they are or represent a religious organization.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State Fund, Inc. is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges

granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United Fund is governed by a board of trustees composed of members of many religious organizations as well as individuals who are members of no religious body but who are concerned with the preservation of the separation of church and state.

The Board of Trustees of Americans United Fund is composed of the Board of Trustees of Americans United for Separation of Church and State, a sister organization with members of various religious beliefs and no religious belief in all states of the United States, including the State of Minnesota. Americans United Fund is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major case coming before this Court dealing with the question of the Establishment Clause of the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973), and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Americans United Fund is particularly interested in the issues raised in this case because it involves a statute which, in this organization's view, interferes with the Free Exercise rights of a new and somewhat unpopular religious group and at the same time places other religious organizations in a more favored position, the result of which violates the command of neu-

trality which the religion clauses of the First Amendment seek to guarantee.

SUMMARY OF ARGUMENT

The Minnesota Statute § 309.515 provides an exemption from the onerous requirements of the Minnesota Charitable Solicitation Law. The Statute specifically exempts religious organizations which raise more than half of their contributions from their membership or from affiliated organizations. Those religious organizations which raise more than half of their contributions from outside of their own group are required to comply with the disclosure provisions. The Court of Appeals and the District Court concluded that the Statute prefers some religions over others and that such preference conflicts with the Establishment Clause of the First Amendment.

Freedom of religion is protected by the First Amendment. It is among the fundamental liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. The religion clauses are to be broadly interpreted and envision broad objectives premised upon a colonial fear of sovereign intrusion into religious affairs.

This Court has established a three-part test as a guide to determine when the Establishment Clause has been violated. The Court has, however, pinpointed several activities which the Establishment Clause is directed against, including the placing of government prestige behind a particular religion and the employment of the political machinery of the government to gain preferred status for a religion or a belief. When the Court finds that a challenged activity impairs one

of these objectives of the Establishment Clause, that activity must be struck down.

Likewise the Free Exercise Clause requires that where a burden has been imposed upon the Free Exercise of religion by action of the state, that clause demands a searching examination of the government's claimed compelling state interest, and the impediment to those objectives that flow from an outright exemption for the individual.

The Free Exercise Clause at times even requires the state to take affirmative steps to remove barriers to the Free Exercise of religion by making special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the Free Exercise of religion. The religion clauses hold a preferred position in our hierarchy of values. When a preferred position is assigned to a constitutional right, two results flow. The presumption of constitutionality which generally exists is not sufficient to validate a statute which invades that right, and the preferred position status requires the use of the doctrine of reasonable alternative. The latter is a requirement that a statute be "narrowly drawn to prevent the supposed evil."

The religion clauses, which have a unified purpose of protecting religious freedom, mandate that government be neutral when it comes to competition between religious sects. This constitutionally required policy of neutrality is derived from an accommodation of the Establishment and Free Exercise Clauses.

The Establishment Clause, as interpreted by the courts today, is designed both to implement the Free Exercise of religion and to prevent civil strife result-

ing when government and religion interfere with one another. Any government action which has the effect of interfering with a religious organization is contrary to this principle of neutrality. The Free Exercise Clause is called upon when the negative effect of government presence is so great that the underlying statute or its administration is bound to be unduly burdensome upon religion. The legislature may go further than is constitutionally required under the Free Exercise Clause in an attempt to accommodate where government action has been involved in limiting the religious freedom of an individual or a religious group.

Here, it is clear that the Minnesota legislature was constitutionally correct in making an exemption for churches when adopting its regulatory provisions for solicitation. In fact, it might be properly argued that such an exemption was constitutionally required under the Free Exercise Clause. The Minnesota legislature, however, acted improperly when it failed to observe the principle of neutrality when granting the exemption and thus went beyond the parameters of constitutionally permissible legislation.

Because the legislation here brought into question has favored some religious groups over others. Plaintiffs, as citizens, should have the right to complain of the injury that they have sustained as a result of the state's violation of the Establishment Clause.

The "over breadth" doctrine has also been applied by this Court to accord standing when there has been a "chilling effect" upon the exercise of First Amendment rights. In this case Plaintiffs have clearly alleged that the criminal penalties of the state statute have sufficient consequences on their actions to constitute

the type of chilling effect which gives Plaintiffs standing to bring this action.

ARGUMENT

I.

THE EXEMPTION PROVISION OF THE MINNESOTA CHARITABLE SOLICITATIONS LAW, WHEN VIEWED IN THE CONTEXT OF THE DISCLOSURE PROVISIONS OF THE STATUTE, VIOLATES THE NEUTRALITY PRINCIPLES EMBODIED IN THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

Minnesota Statute § 309.515 provides an exemption from the onerous requirements of the Minnesota Charitable Solicitations Law. Subsection (b) thereof specifically states that "religious organizations which raise more than half of their contributions from their membership or from affiliated organizations" are exempted from having to comply with the disclosure provisions of the Statute. As the Court of Appeals noted in its opinion:

> It is manifest that certain religious groups will suffer material burdens as a result of the obligations imposed by the Act and that certain other religious groups, not subject to the Act, by virtue of the predominance of membership funding, will enjoy complete exemption from the demands of registration or disclosure. We must conclude that the Minnesota Statute prefers some religions over others. Such preference is in conflict with the Amendment prohibiting establishment of religion by law, in the absence of compelling secular justifications like those sustained in *Gillette.*

637 F.2d 569.

Historically, Minnesota has exempted religious organizations from the provisious of the Charitable Solicitations Law. Between 1961 and 1978 registration

and financial reporting was required of religious organizations except "[a]ny group or association serving a bona fide religious purpose when the solicitation is connected with such a religious purpose . . . ." Minn. Stat. § 309.515 (1976). In 1978 the Minnesota Statute was amended in several respects. It was at this time that the exemption provision in question was enacted into law. See Minn. Laws 1978, ch. 601, § 5.

The constitutional fabric of our nation has woven within it the concept that religious freedom is to be protected as an exalted right. As the highly-respected, late constitutional law professor Paul Kauper stated: "Of all the constitutional guarantees, the protection of religious liberty has been the most exalted." P. Kauper, *Religion and the Constitution* 19 (1964).

The Chief Justice, referring to the preferential position of the First Amendment, stated it this way: "The values enshrined in the First Amendment plainly rank high 'in the scales of our national values,' . . . ." *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979).

It is basic that the free exercise of religion occupies a fundamental and preferred position. The freedom of religion, which is protected by the First Amendment, is among the fundamental liberties protected by the due process clause of the Fourteenth Amendment from impairment by the state. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943); *Murdock* v. *Pennsylvania,* 319 U.S. 104 (1943); *Abington Township School Dist.* v. *Schempp,* 374 U.S. 203 (1963); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

The First Amendment provisions prohibiting an abridgement of religious freedom and prohibiting all laws respecting an establishment of religions are to be

broadly interpreted. *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

The religion clauses envisioned broad objectives premised upon a general colonial fear of sovereign intrusion into religious areas. This Court has expressed its concern for the zealous protection of religious liberty when it suggested that the First Amendment "radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves free from state interference, matters of church government, as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952).

In *Everson* v. *Board of Education, supra,* this Court, for the first time, held that the Establishment Clause incorporated the principles of separation of church and state. Not only did the Establishment Clause prohibit an established religion, but it went farther and sought to isolate the affairs of government from the affairs of religion, or in Jefferson's famous language, to "erect a wall of separation between church and state." Even the dissenters in *Everson* agreed, differing only as to where the wall should be built. In the words of Mr. Justice Rutledge, "It [the First Amendment] was to create a complete and permanent separation of the spheres of religious activity and civil authority . . ." *Id.* at 331-32 (Rutledge, J., dissenting).

The religion clauses of the First Amendment are largely the words of Thomas Jefferson and James Madison; they grew out of a conviction on the part of those two distinguished patriots that the union of church and state was destructive to both.

Most of the colonies had established churches, and it was the desire of many that such establishment con-

tinue after independence from Britain. Patrick Henry introduced a bill in the General Assembly of Virginia "For the Support of Teachers of the Christian Religions." Madison instantly responded with his famous "Memorial and Remonstrance Against Religious Assessments," which, as this Court has recognized, "is the foundation for the religion clauses of the First Amendment, and a guide to their interpretation." Said Madison:

> . . . [I]t is proper to take alarm at the first experiment on our liberties. . . . The freedom of America did not wait til usurped power had strengthened itself by exercise. . . . They saw all the consequences in the principle, and they avoided the consequences by denying the principle.

Id. at 64-65.

The exact language of the religion clauses underwent several changes in Congress before the Bill of Rights was submitted to the states; but the principle embodied remained that of "Memorial and Remonstrance." S.Doc. 92-82, 92nd Cong., 2nd Sess. 911-12 (1974).

This Court has in fact subsequent to *Everson,* declared that it will "not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664, 669 (1970).

In *Walz,* the Court recognized the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." *Id.* at 672.

Although many perplexing questions in constitutional law have been presented by cases arising under

the Establishment Clause, this Court has fashioned a three-prong test by which to judge the constitutionality of a statute or governmental act. In order to pass constitutional muster, a statute or governmental act must: 1) reflect a clearly secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive governmental entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-614 (1971); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973).

The Court has pinpointed several activities which the Establishment Clause is directed against. They include the placement of the government's prestige behind a particular religion, *Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962), and the employment of the political machinery of the government to gain a preferred status for a religion or a belief. *Abington Township School Dist.* v. *Schempp, supra* at 222.

When the Court finds that a challenged activity impairs one of the objectives of the Establishment Clause, that activity must be struck down.

The First Amendment command does not simply prohibit the government from establishing a national church or religion. Rather, the First Amendment states that there shall be "no law *respecting* the establishment of religion." (Emphasis supplied.) A law respecting the proscribed result is not always easily identifiable as one violative of the Establishment Clause. A given act might not establish a state religion or favor religion generally but nevertheless be one "respecting" that end in the sense of being a step that could lead to such an establishment and hence

offend the First Amendment. *Lemon* v. *Kurtzman, supra* at 612.

Professor Laurence Tribe has stated it this way:

> Even if it cannot be shown that a governmental policy was aimed at a religious aspect of behavior, if the essential effect of the government's action is to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief, it should be struck down as violative of the Free Exercise Clause if the effect is negative, and of the Establishment Clause if positive.

L. Tribe, *American Constitutional Law* 855 (1978).

This Court has held that its "cases simply do not support the notion that a law found to have a 'primary effect' to promote some legitimate end under the state's policy power is immune from further examination to ascertain whether it also has a direct and immediate effect of advancing religion." *Nyquist, supra* at 783-84. With reference to this judicial declaration, Professor Tribe states:

> The constitutional requirement of "primary secular effect" has thus become a misnomer; while retaining the earlier label, the Court has transformed it into a requirement that any non-secular effect be remote, indirect and incidental. This incidental standard plainly compels a more searching inquiry, and comes closer to the absolutist aid approach to the Establishment Clause than the primary effect test did.

Tribe, *supra* at 840.

The third prong of the Establishment test requires a finding that there is no excessive governmental en-

tanglement involved. The "entanglement" test was first postulated by this Court in *Lemon* v. *Kurtzman, supra.* There, this Court called for the close scrutiny of the degree of entanglement when there is state involvement with religious institutions. Specifically, it said that "the objection is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Id.* at 604.

In *Walz* the Court emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church. *Walz, supra* at 672.

In *Lemon* the Court said it is enough to strike down government regulations where "a reasonable likelihood or possibility of entanglement exists." *Lemon, supra* at 602. In a subsequent case, this Court spoke of the "substantial risk" of potential church-state conflict. *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472, 479-81 (1973).

In spite of repeated judicial assertions revering the Free Exercise Clause of the First Amendment, those individuals who laid claim to these rights in our courts rarely prevailed against the government prior to this Court's 1963 decision in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where the Court first articulated its test for Free Exercise rights under the First Amendment.

In *Sherbert,* this Court made a major shift in balancing the interests of the state against the Free Exercise rights of an individual. This Court, although not specifically overruling an earlier decision in *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961), expanded the scope of the previously-dormant Free Exercise Clause, as well as the extent of the required inquiry into the

state's interest set up in opposition to the Free Exercise claim. *Sherbert* has given the Free Exercise Clause its present vitality. It established a new balancing test to resolve the competing interests existent when First Amendment rights are at stake.

In *Sherbert,* this Court, in considering the competing interests, announced the test for a Free Exercise case: (1) Is there a burden imposed on the Free Exercise of religion? *Id.* at 403. (2) If there is such a burden is the infringement justified by compelling governmental interest? *Id.* at 406. (3) Even if a compelling governmental interest has been shown to exist, is there any less intrusive, alternative means available to meet the state's objective? *Id.* at 407.

This Court made clear that not every interest will overbalance a Free Exercise claim. The interest must be shown to involve a grave and paramount state concern. Id. at 405. " 'Only the gravest abuses . . . give occasion for permissible limitation.' " *Id.* at 406.

In *Sherbert* this Court made clear that its threshold inquiry was substantially different from that of *Braunfeld.* There was to be a much stronger showing by the state than that required under the "secular purpose test" of *Braunfeld.* The *Braunfeld* Court speaks of exercising the "most critical scrutiny" when an individual asks the Court to strike down governmental action that only has an indirect impact on his Free Exercise claim. *Braunfeld* v. *Brown, supra* at 606. In *Sherbert* the Court demands a searching examination of the government's claimed compelling state interest and the impediment to those objectives that flow from an outright exemption for the individual.

Sherbert makes clear that at times the government is required under the Free Exercise Clause of the First Amendment to take affirmative steps to remove barriers to the Free Exercise of religion by making special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the Free Exercise of religion.

To understand the legal reasoning behind this Court's holding in *Sherbert* and its progeny, it seems necessary to recognize the importance of the preferred position of the First Amendment. Most First Amendment rights are not absolute; but this Court has nevertheless accorded to all of them on one occasion or another a preferred position. When a preferred position is assigned to a constitutional right, two results flow. The presumption of constitutionality which generally exists is not sufficient to validate a statute which invades that right. Wormuth, *The Impact of Economic Legislation Upon the Supreme Court,* 6 J.Pub. L. 296 (1957). And in fact it has been held by a court of appeals that "governmental action affecting fundamental rights does not enjoy a presumption of constitutionality; rather, the burden is upon the government to show compelling governmental interest justifying intrusion." *Tygrette* v. *Washington,* 543 F.2d 840, 849 (D.C. Cir. 1974). This Court has observed that where fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670 (1966). This Court also has long held that if the basis of classification is inherently suspect, the statute must be subjected to exacting

scrutiny, regardless of the subject matter of the legislation. *Kramer* v. *Union Free School District,* 395 U.S. 621, 628 n.9 (1969).

In the instant case fundamental rights and liberties are asserted by the Plaintiffs. Clearly the classifications made by the State of Minnesota with reference to the exemption provision "might invade or restrain" the fundamental rights and liberties asserted by the Plaintiffs. Therefore, the legislative determination which was made may not be approved simply by reference to a general presumption of constitutionality.

A second result of the preferred position status requires the use of the doctrine of reasonable alternative. That is a requirement that a statute be "narrowly drawn to prevent the supposed evil." *Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940); Wormuth & Murkin, *The Doctrine of the Reasonable Alternative,* 9 Utah L.R. 254, 302 (1964).

The doctrine of reasonable alternative requires the government to employ the least restrictive course that will accomplish the desired objective. This doctrine was implanted in the law of intellectual freedom as early as 1923. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Twelve years before the *Sherbert* decision, this Court, in *Shelton* v. *Tucker,* 364 U.S. 398 (1960), struck down a state statute requiring teachers to file affidavits listing the organization to which they belonged. In *Shelton* the Court recognized that the First Amendment needs breathing space and that a statute which burdens the exercise of First Amendment rights must be narrowly drawn. *Id.* at 488.

The Court in *Shelton* held that even though the governmental purpose may have been legitimate and

substantial, that purpose could not be obtained by a means that infringed upon present liberties if a less intrusive method of shifting means were available. The Court held that "[t]he breadth of legitimate abridgement must be viewed in the light of the least drastic means for achieving the same basic purpose." *Ibid.*

Of considerable importance is the fact that in the area of First Amendment rights, when this Court has applied the doctrine of reasonable alternative, the alternative means of satisfying legislative goal has not been required to be as satisfactory as the broader law. Wormuth & Murkin, *The Doctrine of the Reasonable Alternative, supra* at 287.

The commands of both the Establishment and Free Exercise Clauses of the First Amendment raise the question of how each relates to the other and to what extent must the state accommodate religion, as well as to what extent government may go to accommodate religious needs. There has and continues to be much legal debate over the question. However, this Court in *Zorach* v. *Clauson* suggested that "separation of church and state" is not an independent principle, that the principle is that of religious liberty. The religion clauses of the First Amendment must be read together, and religious liberty is to be protected by the First Amendment against governmental action either through establishing religion or prohibiting its free exercise. *Zorach* v. *Clauson,* 343 U.S. 306 (1952).

In *Zorach* this Court recognized the principle of religious accommodation and noted that the people of the United States are in fact a religious people. This accommodation is permitted in order to maintain a

neutrality between religious believers and non-believers. The Court explained:

> The government must be neutral when it comes to competition between religious sects, . . . but there is no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . .

Id. at 314.

In *Walz* v. *Tax Commission of the City of New York, supra* at 669-70, this Court stated:

> Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the establishment and free exercise clause has prevented the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice.

The Establishment Clause as interpreted today is designed both to implement the free exercise of religion and to prevent civil strife resulting when government and religion interfere with one another. To accomplish these inter-related purposes, government must be prevented from officially endorsing or putting its weight behind any religious belief. Correspondingly, any government action, which has the effect of interfering with a religious group, is contrary to the principle of neutrality. It might be argued by some separationists that no exemption from the Minnesota Charitable Solicitation Act should be granted to churches because of a claimed violation of the Establishment Clause. The

Establishment Clause, however, should not be so indiscriminately applied as to impair the free exercise of religion. The Establishment and Free Exercise Clauses are largely inter-related, both in the type of situations in which they arise and in the evils they are designed to prevent. Consequently, they should be construed together so as not to work at cross purposes.

This Court has, in several cases, ruled that the religion clauses of the Constitution mandates an accommodation for religious needs. In *Sherbert* v. *Verner, supra,* this Court required an exemption from the disqualification provision of a state's unemployment statute so as to accommodate Mrs. Sherbert's sabbatarian belief. In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), this Court required that Amish parents be accommodated as against the state's compulsory school-attendance statute, and in *Thomas* v. *Review Board,* 101 S.Ct. 1425 (1981), this Court held that the personal religious scruples of a Jehovah's Witness against manufacturing armaments constitutionally required an exemption from the strict state unemployment statute.

The Court in *Sherbert* made clear that although judicial action declaring a practice a violation of the Free Exercise Clause might be construed as a carving out of an exception on the basis of religion, such an exception may be compelled by considerations of Free Exercise cannot be regarded as an establishment of religion.

The concept of government accommodation of religion does not begin and end only with the question of whether the religion clauses of the First Amendment requires an exemption from a governmentally-required duty.

It has been unequivocally declared that "[t]he limits of permissible state accommodation to religion are by

no means coextensive with the non-interference mandated by the Free Exercise Clause." *Walz, supra* at 673. The legislature may go further than is constitutionally required under the Free Exercise Clause in an attempt to accommodate where government action has been involved in limiting the religious freedom of an individual or a religious group.

In the ordinary Free Exercise case, the negative effect of government presence is so great that the underlying statute or its administration is declared unconstitutional. The "legislative Free Exercise" rationale, on the other hand, would by virtue of the Free Exercise Clause vest the legislature with discretion to remove negative effects. The legislative requirement of reasonable accommodation for religious convictions is a proper application of legislative Free Exercise, which even if not mandated by constitutional requirement, is appropriate for legislative action.

Here, it is clear that the Minnesota legislature quite properly made an exemption for churches in its statutory scheme. In fact, it might even be properly argued that such an exemption was constitutionally mandated. The error committed by the Minnesota legislature, however, was the failure to observe the principle of neutrality when granting the exemption. Failure to observe the necessary constitutionally mandated neutrality has resulted in two impermissible constitutional effects. They are (1) adverse impact on those religious groups that have small memberships and rely for their financial support on the general public and (2) favored treatment for more established groups which are able to support their religious mission from contributions primarily from their own members, although under the statute the exemption still would be left intact for the latter group even if 49% of the funds are received from

the general public. Clearly, the legislature chose a classification which is purely arbitrary in character. No one has suggested, nor could it be that the possibility of fraud is greater when a church receives 51% of its financial support from outside of its own body than if it receives 51% from its own congregation. Since this arbitrary classification is violative of the neutrality principles, and must be struck down, to countenance this type of arbitrary classification to determine which churches will be subject to onerous governmental regulation can, and in the course of natural events, will most probably lead to all types of mischief violative of the principles set forth in the religion clauses of the Constitution.

If the Minnesota exemption statute is permitted to stand in its present form by sanction of this Court, legislatures throughout the country will have an appealing vehicle to favor those religious groups that may have influence upon the legislative will and at the same time to permit the destructively coercive powers of government to be brought to bear on disfavored religious bodies. Certainly, this is one of the evils which the religion clauses of the First Amendment was designed to prevent. This Court has rather consistently steered a course in all of its decisional law on the religion clauses to protect the principle of neutrality and make certain that all agencies of both state and federal governments were kept within these parameters.

II.

PLAINTIFFS HAVE STANDING TO CHALLENGE THE MINNESOTA STATUTORY PROVISION HERE AT ISSUE.

This Court has stated in order for litigants to satisfy the Article III constitutional requirements of making

out a case or controversy, "the plaintiff must show that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979).

In *United States Parole Commission* v. *Geraghty,* 445 U.S. 388 (1980), this Court noted that the case or controversy limitation serves two complementary purposes: (1) "It limits the business of the federal courts to 'questions presented in an adversary context and in a forum historically viewed as capable of resolution through the judicial process' " and (2) "[I]t defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government.' "

In *United States Parole Commission* v. *Geraghty, supra,* 100 S.Ct. at 1212-13, n.11, this Court noted that the prior cases decided by the Court were somewhat confusing but pointed out that the strict formalistic view of Article III jurisprudence, while the starting point of all inquiry, is riddled with exceptions and in creating each of these exceptions, the Court looks at the practicalities and prudential considerations. This Court characterized the resulting doctrine as "flexible."

In *Association of Data Processing Services Organizations* v. *Camp,* 397 U.S. 150, 164 (1970), this Court acknowledged that "a person . . . may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause."

In *Engel* v. *Vitale, supra* at 430-32, this Court recognized that the Establishment Clause, unlike the Free

Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which established an official religion whether or not these laws operate directly to coerce nonobserving individuals. One of the purposes of the Establishment Clause, according to the Court in *Engel*, rested upon an awareness of the historical fact that governmental established religions and religious persecutions go hand in hand. As previously noted, the Establishment Clause does not require that a church be established as the official state church before the Establishment Clause is implicated. What is condemned is any state act respecting or tending to establish any religion. What is to be avoided is a deviation from the policy of neutrality.

Plaintiff have the right to expect, and in fact demand, that government, either federal or state, observe the principles of neutrality in all of their official actions. Plaintiffs suffer a concrete injury to a fundamental right, a right protected by the first guarantee of the Bill of Rights when this principle of neutrality is not rigidly adhered to by the state. The Establishment Clause of the First Amendment was obviously adopted to prevent the majority from acting in a way that would place any religion or religion generally in either a more favored or less favored position than a neutral course would dictate.

Establishment Clause cases reach to the very core of our basic constitutional protection. It is the special role of the judiciary to protect such a fundamental right and to insure that the state has not veered off course in the normal political processes.

The state apparently does not contend that the Plaintiffs in this action do not have standing to commence

the suit. Rather it claims that the court below erred in applying the "over breadth doctrine" to an Establishment Clause challenge when there has not been a finding that the Plaintiffs represent a religious organization. It is suggested, however, that the state misses the point. Once the state has taken an action which has the effect of favoring one religious group over another or favoring religion generally, a citizen should have a right to complain of that state action by right of the fact that he is a citizen living under a principle of constitutional law that guarantees a government neutral on matters of religion. Once this neutrality has been violated and injury has occurred for which the Plaintiff may seek relief, it is not a matter of constitutional consequences that the Plaintiffs be a member of any church in order to object to government's favoring of any religious organization. Once government by its legislation has deviated from its neutral course, a citizen, whether religionist or not, offended by this action has a right to seek redress in the courts.

In addition, this Court has recognized that the doctrine of "over breadth" should accord standing by reason of the "chilling effect" that a particular law might have upon the exercise of First Amendment rights. In this case Plaintiffs clearly are subject to the penalizing powers of the state of sufficient consequence as to be affected by the chilling winds of the statute here in question. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 167-68 (1972); *Law Students Civil Rights Research Council* v. *Wadmond,* 401 U.S. 154 (1971).

In *Flast* v. *Cohen,* 392 U.S. 83 (1968), the Court pointed out that it is appropriate to examine the substantive issues involved to "determine whether there is a logical nexus between the status asserted and

the claim sought to be adjudicated." *Id.* at 102. Standing can be discussed meaningfully only in the context of the precise contention of the parties. Plaintiffs clearly claim that the Minnesota legislation has not only placed their church is a disfavored position and interferred with their personal Free Exercise rights, but in addition has placed other religious groups in a more favored position. Both the District and Appeals Courts below, after examining the statute, agreed that the statutory-exemption provision did in fact place certain churches in a more favored position. Although it has been claimed that standing is a threshold question, here we are not dealing with the Plaintiff's right to initiate this suit but the right of the Court to rule on the constitutionality of the exemption provision before determining if Plaintiff's church is a religious organization. It would seem that standing in this context is clearly not a threshold issue. One commentator has even suggested that standing should never be treated as a threshold issue but rather should be viewed as a component of Plaintiffs' claim for relief since its resolution necessarily involved substantive issues, such as injury, duty, and causation. See L. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief,* 83 Yale L.J. 425, 426-27 (1974).

It would seem counterproductive to put the judicial process in reverse on the grounds of standing if in fact the exemption provision of the Minnesota statute does violate the Establishment Clause. Such artificial use of the standing argument does not comport with the prudential purposes for which this Court has previously applied standing as a bar to judicial determination.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

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